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NOTE

STUDENTS' SHRINKING FIRST AMENDMENT RIGHTS IN THE PUBLIC SCHOOLS: *BETHEL SCHOOL DISTRICT NO. 403 v. FRASER*

INTRODUCTION

American courts treat the first amendment¹ freedom of expression and the corollary freedom to receive information as paramount in the Constitution.² However, courts do not grant the full range of free speech rights to minors. For example, some forms of expression, such as pornography, are available to adults but are forbidden to minors. Also, certain content-based regulation of speech in primary and secondary schools may be necessary to maintain peace and order in the classroom. The Supreme Court recently decided that a minor's constitutional rights under the fourth amendment can be outweighed by the interests of school administrators to run a safe and quiet place to learn.³ Until recently, the Court made no similar pronouncement

1. The first amendment to the United States Constitution states in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. Nevertheless, the Supreme Court has authorized state limits on speech. *See, e.g.,* *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (city may zone adult theatres and bookstores to disperse them; adult materials deemed less deserving of protection than other types of speech); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (political candidates had no constitutional right to advertise on city buses; city has interest in protecting captive audience of riders); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech and advocacy proscribed when directed toward inciting or producing imminent lawless action).

See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 582 (1978) (describes recurring debate between first amendment absolutists and those who advocate careful balancing of speaker's and government's interests). Professor Tribe argues that the balancing test optimally maintains free speech rights because the test is less open to court manipulation. *Id.* at 583-84. However, a dilemma faces any court that attempts to balance one preferred right over another. Absolute freedom of speech rights would eliminate any problems the court may face in balancing all interests. Absolutists argue that when speech rights are balanced against state interests, the inherent imprecision in the decisions leaves the law perpetually unsettled. *See, e.g.,* Sciarrino, "Free Exercise" Footsteps in the Defamation Forest: Are "New Religions" Lost?, 7 AM. J. TRIAL ADVOC. 307, 318 (1984).

3. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985), is one of the Supreme Court's latest decisions on schoolhouse rights. In *T.L.O.*, the Court severely limited the fourth amendment rights of students by holding that public school officials may conduct searches of students

about the first amendment.⁴

In *Fraser v. Bethel School District No. 403*,⁵ the Ninth Circuit Court of Appeals provided the Supreme Court with a fresh opportunity to define the scope of first amendment rights in the schools. The court of appeals found that a school district violated a high school student's first amendment rights when it suspended him for making a sexually suggestive speech at a school assembly. Although the appellate court did not acknowledge the full range of cases in this field, it did recognize and discuss two main issues. First, the court found that the speech was not obscene for purposes of use by minors. Second, the court decided that the school's interest in maintaining order did not outweigh students' right to free expression. On review, the Supreme Court rejected the Ninth Circuit's rationale and held that the speech was obscene.

This Note begins by discussing generally the first amendment rights of children and then more specifically the rights of children in the public schools. The Note will next illustrate how the Supreme Court in *Fraser* failed to properly address the factual findings of the Ninth Circuit's decision and disregarded its own precedent with respect to students' first amendment rights. To remedy the confusion generated by the Supreme Court's decision in *Fraser*, the Note proposes a model for examining students' rights. This proposed model is intended to provide a systematic methodology for analyzing students' first amendment rights, while ensuring proper deference to prior Supreme Court students' rights decisions.

without first obtaining a search warrant and that the search can be performed if it is based on reasonable suspicion. *Id.* at 743. This standard ignores the procedural safeguards provided by the fourth amendment to adults. As Justice Brennan argued in his dissent, the *T.L.O.* Court ignored three principles that are conventionally believed to underlie the fourth amendment. First, warrantless searches are per se unreasonable unless a specific qualified exception exists. Second, the constitutional standard for searches is that officials have probable cause to believe that a crime has occurred and that evidence will be found in the place searched. Third, searches may be justified if the individual's privacy is protected during the search. *Id.* at 750-51 (Brennan, J., dissenting).

It is not clear whether *T.L.O.* should be limited to the fourth amendment, or whether the Court intends to challenge other constitutional rights of children by the same analysis. Rush, *The Warren and Burger Courts on State, Parent and Child Conflict Resolution: A Comparative Analysis and Proposed Methodology*, 36 HASTINGS L.J. 461, 486 n.146 (1985). As evidence of the latter trend, see *Schall v. Martin*, 104 S. Ct. 2403 (1984) (preventive detention of juveniles constitutional, limiting *In re Gault*, 387 U.S. 1 (1967)). See generally Note, *Where Have All the Children Gone? The Supreme Court Finds Pretrial Detention of Minors Constitutional*, 34 DEPAUL L. REV. 733 (1985) (canvass of Supreme Court developments in constitutional protections for juveniles) [hereinafter cited as Note, *Where Have All The Children Gone?*].

4. *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986) (most recent Supreme Court decision regarding first amendment rights of students). In *Fraser*, the Court held that the use of lewd and obscene speech by a student in order to make a point in a nominating speech for another student could be regulated by school officials. *Id.* at 3166.

5. 755 F.2d 1356 (9th Cir. 1985).

I. BACKGROUND

Courts have advanced various theories in limiting a minor's freedom of expression. One theory is that speech that might not be obscene for adults should be isolated from children to protect them from psychic harm. This theory is consistent with the paternalistic scheme of American law that exempts children from civil and criminal liability because of their immaturity.⁶ A second restriction on children's first amendment rights is the state's interest in promoting peace and order in the classroom. In this context, the Supreme Court has presumed the constitutionality of student speech, subject to proof by the state that the particular speech actually disrupts the school routine. The cases that apply these standards share consistent themes; deference to legislation designed to protect children from vulgar speech, and suspicion of official claims that protected speech should be limited in school.

A. First Amendment Rights of Children

The leading Supreme Court decision regarding first amendment rights of children is the 1968 case of *Ginsberg v. New York*.⁷ In *Ginsberg*, the Court upheld the power of the state to forbid the sale of materials declared obscene for children to minors, even though the materials were not obscene for adults.⁸ Because the magazines in *Ginsberg* were not obscene under adult

6. For example, in the area of negligence, the law recognizes the inability of children to understand the consequences of their acts. Thus, the standard of contributory negligence for children is stricter than it is for adults. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 180-81 (5th ed. 1983). In the area of contracts, the common law holds that any contract into which a minor enters is voidable. The theory behind this doctrine is that children lack the judgment and experience necessary to act in their own best interests. See J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 232-33 (2d ed. 1977) (critical view of doctrine). In criminal law, children do not undergo criminal prosecution, but instead undergo rehabilitative procedures within the juvenile justice system. See generally Note, *Where Have All The Children Gone?*, *supra* note 3. Other age-based limitations are evident in the Constitution. See, e.g., U.S. CONST. art. I, § 2, cl. 2 (age requirement for members of the House of Representatives); U.S. CONST. art. II, § 3, cl. 3 (age requirement for members of the Senate); U.S. CONST. amend. XXVI (voting age requirement).

7. 390 U.S. 629 (1968). The case was decided along with *Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676 (1968), which struck down on vagueness grounds an ordinance that permitted city officials to enjoin the presentation of movies "not suitable for young persons."

8. 390 U.S. at 629-30. The state statute involved was N.Y. PENAL LAW § 235.21 (McKinney 1967) (current version at N.Y. Penal Law § 235.21 (McKinney 1980)). The New York statute prohibits the sale to anyone under seventeen of any material that depicts nudity, sexual conduct, or sado-masochistic abuse in a way that is harmful to minors. The statute also limits the availability to minors of material containing "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse . . . where such material or its presentation is harmful to minors." *Id.* § 235.21(b).

As defined in the statute, "harmful to minors" uses the adult constitutional standard of obscenity with modification for minors. Harmful to minors is defined as:

that quality of any description or representation, in whatever form, of nudity,

standards, the first amendment protected the sale of these magazines to adults.⁹ Nevertheless, the Court held that a state may legislate a standard of obscenity for minors that encompasses a greater range of erotic materials than would be found obscene for adults.¹⁰

The State of New York asserted two interests in support of its statute. One interest was protecting the right of parents to limit their children's access to sexual literature.¹¹ The second interest was promoting the state's "independent interest in the well-being of its youth."¹² Although the state

sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Is utterly without redeeming social importance for minors.

Id. § 235.20(b).

9. Adult obscenity standards were defined in *Roth v. United States*, 354 U.S. 476 (1957), and more recently in *Miller v. California*, 413 U.S. 15 (1973). In *Roth*, the Supreme Court defined obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U.S. at 484. The *Roth* Court also stated that "all ideas having even the slightest redeeming social importance" are to be protected. *Id.*

In *Miller*, the Supreme Court expanded the definition of obscenity to include expression which, while not without some social value, is regarded by the court as having no serious value. 413 U.S. at 19. The Court developed a three-part test for identifying material deemed as obscene. *Id.* The test is:

- (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interests
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citations omitted).

10. 390 U.S. at 638. The Court stated that, "even where there is an invasion of protected freedoms, 'the power of the State to control the conduct of children reaches beyond the scope of its authority over adults.'" *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)). The variable obscenity concept was first described in Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961). Dean Lockhart and Professor McClure were concerned about varying obscenity laws to protect immature children from the evils of pornography. See also Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960), in which the authors suggest that the Supreme Court should identify variable obscenity standards to guide the lower courts.

11. 390 U.S. at 639.

12. *Id.* at 640. The Court held that the state has greater power to regulate the access of children to sexually explicit materials than to regulate the conduct of adults. The Court apparently found that the immaturity of minors and the state's interest in promoting morality justify different rules. See Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963).

The Supreme Court limits minors' rights in other constitutional areas, in view of the supposed immaturity of children and their presumed inability to make choices in an intelligent, rational and independent manner. See, e.g., *Schall v. Martin*, 467 U.S. 253 (1984) (preventive detention

supplied no empirical support for its claim that exposure to erotic material is harmful to children, the Supreme Court deferred to the state's finding of a potential harm.¹³

The *Ginsberg* decision is a narrow one because it permits regulation directed at minors only if the material falls within the variable obscenity standard. The decision does not support broad state restrictions on a minor's access to written material.¹⁴ Moreover, the New York statute challenged in *Ginsberg* was narrowly drawn and only restricted material that presented sexual conduct in a way that would be harmful to minors. The law was not intended to suppress the conveyance of ideas to minors.¹⁵

The variable obscenity standard introduced in *Ginsberg* was used again in *FCC v. Pacifica*.¹⁶ *Pacifica* involved a radio broadcast of George Carlin's comic monologue "Filthy Words."¹⁷ In *Pacifica*, the Supreme Court allowed the Federal Communication Commission (FCC) to sanction a radio station for broadcasting "indecent" language at a time of day when children were probably in the audience. The Court found the language in the "Filthy Words" broadcast "patently offensive,"¹⁸ but not obscene.¹⁹

of juveniles to protect child from own criminal tendencies is permissible); *Ferber v. New York*, 458 U.S. 747 (1982) (upheld laws prohibiting solicitation of children for pornography); *H.L. v. Matheson*, 450 U.S. 398 (1981) (sustained state statute requiring doctor to give parents notice before performing abortion on minor); *Parham v. J.R.*, 442 U.S. 584 (1979) (child's liberty interest in not being held in state mental institution is "inextricably linked with the parents' interest in and obligation for the welfare and health of the child"); *Bellotti v. Baird*, 428 U.S. 132 (1976) (state can compel minor female to demonstrate that she has sufficient maturity and competence to make decisions about her own abortions).

13. The Supreme Court used this same theory in *New York v. Ferber*, 458 U.S. 747 (1982). There the Court held that a state may ban the distribution of matter depicting children engaged in sexual activities, even though the material is not legally obscene under adult standards. The Court relied on the state's compelling interest to prevent the sexual exploitation and abuse of children who were photographed in producing such material. *Id.* at 750-55. As in *Ginsberg*, the *Ferber* decision recognized the legitimate interest of the state in protecting children. *Id.* at 750-60.

14. *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 93, 127 (1968). The author concluded that the variable obscenity standard, because of its vagueness, would be hard to apply in practice. *Id.* at 130.

15. *Id.* at 127-28. The statute challenged in *Ginsberg* also attacked sales of "obscene" material to children for profit. This attack is similar to the one made in *Ferber*, in which the Supreme Court was concerned with the exploitation of children. *See supra* note 13.

16. 438 U.S. 726 (1978).

17. *Id.* at 751-52. The offensive words in the broadcast were shit, piss, fuck, cunt, cocksucker, motherfucker and tits.

18. *Id.* at 731. The Court recognized that the "concept of 'indecent' is intimately connected with the exposure of children to language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 731-32 (citing *In re Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1984)).

19. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 753 (2d ed. 1983). For the first time, the Supreme Court reviewed the extent of the federal government's power to prohibit radio speech because of its "offensive content."

The plurality opinion concluded that the FCC's interests in regulating the broadcast exceeded the station's free speech interests in playing the monologue. First, the Supreme Court found that listening children formed a captive audience.²⁰ Because the broadcast entered the privacy of the home, the minor audience was captive until they or their parents switched to another station. Although the radio station warned listeners of the offensive nature of the material, the Court found the privacy interest paramount.²¹ Second, the Court held that the federal government could constitutionally shield young children from indecent speech. The FCC found that the early afternoon broadcast of the monologue was easily accessible to children.²² The FCC did not claim that it could regulate indecent language at all times. Instead, the FCC argued that the time of day was a reliable indicator for determining the presence of children in the radio audience.

Although *Pacifica* was a plurality decision,²³ the case significantly impacts the area of minors' first amendment rights. The opinion balanced a broadcaster's right to play profane or indecent language against the FCC's interest in preventing undesirable influences on children.²⁴ By so doing, the Court recognized that a child's first amendment right to receive information can be limited because of the content of the information. Additionally, by holding that the FCC can regulate programming to protect children in the radio audience against indecent speech, the Court concluded that public broadcasts are subject to special government restrictions.²⁵ The Court explained that because electronic broadcasters cannot screen their audience, the government may limit the broadcast of certain types of adult programming to evening hours. Five members of the Court agreed that the unique characteristics of the broadcast media, along with the state's interest in protecting children

20. 438 U.S. at 748-49. As one of the reasons for restricting broadcast material, the Court found that such material cannot be kept from children once it goes out over the airwaves. The Court relied on prior psychological data of the effect of the broadcast medium on children. *Id.*

21. *Id.*

22. *Id.*

23. Justices Brennan and Marshall explicitly rejected the majority opinion of Justice Stevens, stating that the kind of language involved was not of a lesser value than other speech and therefore could not be regulated. *Id.* at 772 (Brennan, J., dissenting). Along with Justices Brennan and Marshall, Justices Stewart and White dissented from the decision on statutory grounds. *Id.* at 778-80 (Stewart, J., dissenting). The FCC's order was affirmed because the concurring Justices, Powell and Blackmun, agreed that the order was necessary to protect children from the broadcast material. *Id.* at 757 (Powell, J., concurring). Only Chief Justice Burger and Justice Rehnquist concurred with Justice Stevens' treatment of the constitutional issues.

24. *Id.* at 748-49.

25. *Id.* at 749. In support of the FCC's decision to restrict "indecent" broadcast material, the Court found that such material cannot be kept from children once it goes out over the airwaves.

and nonconsenting adults from offensive speech, justified the FCC's restriction on the broadcast.²⁶

It is significant that the *Pacifica* plurality did not use a "strict scrutiny" test in evaluating an administrative action that suppressed speech.²⁷ Freedom of expression is a constitutionally protected right, and any restriction placed on that right should be given strict scrutiny by the courts.²⁸ Strict scrutiny requires that the state have a compelling interest in restricting the constitutional right; however, the *Pacifica* Court allowed the FCC to sanction a broadcaster without showing a compelling state interest. The sole purported interest of the FCC was protecting children from indecent broadcasting.²⁹

The *Pacifica* Court balanced the value of the content of publicly broadcast speech against the harm that the speech might cause to children who hear it.³⁰ This balancing approach is similar to the analysis used in *Ginsberg*. Both decisions conclude that children have a first amendment right to receive information, but that the state has the power to restrict that right in certain limited instances.³¹

26. *Id.* at 750, 762 (Powell, J., concurring). Justice Powell's concurring opinion described the unique characteristics of the broadcast medium:

During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for first amendment purposes.

A second difference, not without relevance, is that broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.

Id. at 758-59 (Powell, J., concurring) (citations omitted).

27. Note, *Pacifica's Seven Dirty Words: A Sliding Scale of the First Amendment*, 1979 U. ILL. L.F. 969, 995.

28. The Supreme Court established a strict scrutiny test for state legislation that interferes with enjoyment of fundamental, constitutionally protected rights. The strict scrutiny test involves a two-level review: 1) the state's objective behind the statutory scheme must be compelling, and 2) the scheme employed must be necessary to achieve the objective. *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 530 (1981) (strict scrutiny of state's refusal to allow religious group to meet on state school campus); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (strict scrutiny of city ordinance prohibiting non-commercial billboards); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (strict scrutiny of state law restricting right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (strict scrutiny of state welfare residency requirements); *Korematsu v. United States*, 323 U.S. 214 (1944) (strict scrutiny of law discriminating on basis of race).

29. 438 U.S. at 749-50. In citing *Ginsberg*, the *Pacifica* Court held that the state's interest in protecting children justified the special treatment given language considered indecent. *Id.* Some scholars argue that *Pacifica* waters down the variable obscenity standard. *See* Gard & Endress, *The Impact of Pacifica Foundation on Two Traditions of Freedom of Expression*, 27 CLEV. ST. L. REV. 465, 479-80 (1978).

30. *Id.* at 744-50.

31. *See also* *Konigsberg v. California State Bar*, 366 U.S. 36 (1961) (Black, J., dissenting)

*B. First Amendment Rights of Children
Within the Public School System*

Two Supreme Court decisions have addressed students' freedom of expression in school.³² *Tinker v. Des Moines Independent Community School District*³³ dealt with a direct infringement of high school students' right to speech. *Board of Education v. Pico*³⁴ addressed the rights of students to receive information in a high school library. Both decisions affirmed the first amendment rights of students, but, in dicta, accorded school administrators broad discretion to limit student speech.

The *Tinker* Court held that a public school district could not bar junior high and high school students from wearing armbands as a protest against the war in Vietnam. In *Tinker*, the school authorities adopted a rule that banned the wearing of black armbands and called for the suspension of students who violated the rule.³⁵ The Court stated that the wearing of armbands was akin to pure speech³⁶ and therefore was entitled to first amendment protection.³⁷ Nevertheless, the Court did not grant high school

(speech can be regulated when aimed not at content, but at "incidental" abridgment); Black & Kahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. Rev. 549, 559 (1962) ("Freedom of speech means that you shall not do something to people either for the views they have or the views they express or the words they speak or write").

32. Children have first amendment rights in the public school, but the rights are limited. The history of the constitutional rights of children within the public school setting can be traced to two Supreme Court decisions from the 1920's. First, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court held a Nebraska law invalid that prohibited the teaching of German to students below the level of eighth grade. In *Meyer*, the Court found that the Nebraska statute did not promote the interest of the state to produce civic-minded children. *Id.* at 402.

Second, in *Pierce v. Society of Sisters*, 286 U.S. 510 (1925), the Supreme Court held that an Oregon law that required children between the ages of eight and sixteen to attend public school was unconstitutional. The *Pierce* Court held that the government's interest in improving the development of children did not warrant the abolition of private education. *Id.* at 534. Both *Meyer* and *Pierce* are cited in present-day cases to support the constitutional rights of students within public schools. See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). However, neither decision presented any theory about the free speech rights of public school students. The *Meyer* and *Pierce* Courts focused on the rights of parents to control the education of their children. *Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. at 534.

33. 393 U.S. 503 (1969).

34. 457 U.S. 853 (1982).

35. 393 U.S. at 504.

36. *Id.* at 505. The Court occasionally distinguishes between pure speech and speech connected with conduct. Government regulation is justified in a case where conduct, as opposed to speech, is regulated. Compare *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding statute barring picketing of courthouse) with *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (refusal to salute flag akin to pure speech). The cases suggest that the distinction between pure speech and speech connected with conduct is a legal fiction. According to Professor Tribe, this distinction "must be seen at best as announcing a conclusion of the Court, rather than as summarizing in any way the analytic processes which led the Court to that conclusion." L. TRIBE, *supra* note 2, at 600.

37. 393 U.S. at 506.

students unlimited license to protest the war. The Court held that if a student's chosen form of expression substantially disrupted the operation of a school, then school officials could constitutionally suppress the speech.³⁸ The *Tinker* Court found that some administrative control over student speech might be necessary to keep peace and order in the school.³⁹ A significant factor in the *Tinker* case was that the school authorities' action was not based on a peace and order interest, but on a desire to preclude any protest of the Vietnam War.⁴⁰ The Court held the school authorities' action unconstitutional because there was no evidence that the presence of armbands substantially interfered with the school's activities.⁴¹

The *Tinker* decision offers insight into how the Supreme Court compares freedom of speech to the peace and order interests of public school administrators. First, the Court found that free speech helps young people prepare for citizenship in a democratic society.⁴² Freedom of student expression is important in developing children's social awareness and citizenship.⁴³ Second, the Court found that school administrators have no legitimate interest in punishing students simply for their political speech.⁴⁴

The first amendment rights of children in public schools were again at issue in *Board of Education v. Pico*.⁴⁵ In this case, the Supreme Court set constitutional limits on the authority of public school boards to remove books from a school library. The school board in a small, upstate New York community ordered that nine books be removed from school libraries.⁴⁶ The

38. *Id.* at 513-14. The Court also stated:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Id. at 509.

39. *Id.* at 507.

40. *Id.* at 510.

41. *Id.* at 514. The Court's central concern in *Tinker* was that students should not be confined in their expression only to those expressions and opinions approved by the school board. *Id.* at 511.

42. *Id.* at 512-13. See Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 338 (1979). Justice Fortas' majority opinion in *Tinker* recognized the child's claim to free speech rights to be the same as adults, subject only to the unique environmental limitations of the school. "First amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S. at 506.

43. 393 U.S. at 506 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

44. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 580-81 (1970).

45. 457 U.S. 853 (1982).

46. *Id.* at 856 n.3. A committee was appointed to review eleven books located in the school district's libraries. The school board suspected that the books were improper for its students. *Id.* at 856-57. The committee consisted of four parents and four members of the school staff. The committee held that five books should be retained, two books should be removed, and

asserted justification for the removal was that the books were "anti-American, anti-Semitic, anti-Christian, and filthy."⁴⁷ The Supreme Court found that a school board may not remove books from a library if the removal is motivated by a political or partisan desire to deny students access to ideas.⁴⁸

Although the *Pico* decision appears to reinforce students' first amendment rights, the holding was a plurality opinion, with limited precedential value.⁴⁹ Furthermore, dicta in the plurality opinion concludes that school districts may generally regulate the holdings of libraries if the material is found to be indecent, vulgar or otherwise educationally unsuitable.⁵⁰ The standard developed in *Pico*, therefore, focuses on the motivation of school authorities.⁵¹ The Court developed the standard to balance the interest of the state

one book should be available to students with the consent of parents. *Id.* at 857-58. The five books recommended to be retained were *Best Short Stories by Negro Writers* (L. Hughes ed. 1967); R. Wright, *Black Boy* (1945); Anonymous, *Go Ask Alice* (1976); O. LaFarge, *Laughing Boy* (1929); and B. Malamud, *The Fixer* (1966). *Id.* at 858 n.5. The two books recommended to be removed were P. Thomas, *Down These Mean Streets* (1969), and D. Morris, *The Naked Ape* (1967). *Id.* at 858 n.6. K. Vonnegut, Jr., *Slaughterhouse Five* (1968) was recommended to be made available to students only with parental approval. *Id.* at 858 n.9. The committee could not agree on the removal of two books: A. Childress, *A Hero Ain't Nothin' but a Sandwich* (1973), and E. Cleaver, *Soul On Ice* (1968). *Id.* at 858 n.7. No action was taken on *A Reader for Writers* (J. Archer ed. 1971), because not all members of the committee were able to read the book. *Id.* at 858 n.8.

The school board ignored the committee's recommendations and ordered nine of the books removed from the school district libraries. *Id.* The nine books ordered removed were *Best Short Stories by Negro Writers*, *A Hero Ain't Nothin' but a Sandwich*, *Soul On Ice*, *Go Ask Alice*, *The Naked Ape*, *Down These Mean Streets*, *Slaughterhouse Five*, *A Reader for Writers*, and *The Fixer*. *Id.* *Laughing Boy* was to be returned to the library, and *Black Boy* was to be made available to students with parental consent. *Id.* at 858 nn.10 & 11.

47. *Id.* at 857.

48. *Id.* at 871.

49. Justices Brennan, Marshall, Blackmun and Stevens upheld the students' first amendment right by limiting the authority of the school board to remove books from school libraries. Chief Justice Burger and Justices Powell, Rehnquist and O'Connor dissented in the decision and held that students' first amendment rights did not place any limitation on the authority of the school board to remove library books. *Id.* at 889 (Burger, C.J., dissenting). The critical dissent of Justice Rehnquist argued that students have no right of access to ideas in school. *Id.* at 904 (Rehnquist, J., dissenting). Justice Rehnquist stated that public education is inculcative and is properly selective in its choice of acceptable subject matter. *Id.* at 909-10. Justice White concurred in the opinion, but concluded that the plurality should not have addressed the first amendment issues until findings of fact and conclusions of law were made at a trial on the merits. *Id.* at 883 (White, J., concurring).

50. *Id.* at 871. For an example of how this idea works in practice, see *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980). The Second Circuit Court of Appeals held that school officials did not violate students' first amendment rights by removing books on the basis of the vulgarity and indecency of language contained therein.

The *Pico* decision does not reveal whether the "vulgarity" standard is encompassed by the standard of indecent speech announced in *Pacifica* or the variable obscenity standard announced in *Ginsberg*. Rush, *supra* note 3, at 477.

51. 457 U.S. at 871. The Court held that if the school board removed the library books to

to inculcate students with community values with the students' first amendment rights.⁵²

The *Pico* decision illuminates the Supreme Court's views about the purposes of public education. The *Pico* Court recognized that the primary function of public schools is to socialize students,⁵³ but separated the function of libraries from this purpose and concluded that libraries provide a unique source of self-enrichment for students.⁵⁴ In the past, the Court has recognized that meaningful freedom of speech entailed a listener's right to hear the speaker's communications.⁵⁵ The *Pico* decision extended this concept by stating that a listener has an independent first amendment right of access to communication.⁵⁶ The Court reasoned that students have a first amendment right to receive information, and that this right extends to the school library. To remove books from a school library deprives students of their first amendment right of access to information.⁵⁷

Pico, like *Tinker*, affirms the student's right to receive information in school. Despite that principle, the two Courts gave different weight to first amendment rights in public schools. The *Tinker* Court recognized that public schools serve as a free marketplace of ideas.⁵⁸ In contrast, the *Pico* Court observed that public schools principally inculcate ideas approved by the community. The Court in *Pico* cautioned federal district courts not to intervene in public school controversies unless a school district's action directly and sharply implicates basic constitutional values.⁵⁹

deprive students of access to ideas with which the school board disagreed, the removal would be unconstitutional. *Id.* In book removal situations, school authorities cannot remove books to suppress ideas, even though school boards traditionally exercise broad discretion over the management affairs of local schools. *Id.* at 859, 863. Among the first amendment rights enjoyed by students, according to Justice Brennan, is the right to receive ideas. *Id.* at 867.

52. *Id.* at 864-66.

53. *Id.* at 864 (citing *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

54. *Id.* at 868-69. The Court held that voluntary inquiry is an important part of the students' education and should be left as free as is reasonably possible.

55. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 409 (1974); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 480-83 (1965).

56. 457 U.S. at 868. *Pico* was the first Supreme Court decision to uphold students' rights to receive information. In support of this position, the Court relied on precedent giving that right to adults. *Id.* at 867 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141 (1943)).

57. *Id.* at 868 (quoting *Tinker*, 393 U.S. at 506).

58. 393 U.S. at 868. Other Supreme Court decisions recognize different constitutional rights which students retain within the school context. See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment in public schools affects constitutionally protected liberty interest, although due process does not require notice and opportunity to be heard prior to punishment); *Goss v. Lopez*, 419 U.S. 565 (1975) (ten-day suspension of student required to meet standards of due process); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state may not require flag salute and recitation of pledge of allegiance as part of receiving public education).

59. 457 U.S. at 864-66. See also *Rush*, *supra* note 3, at 474-75 (although Court in *Pico* recognized students' first amendment rights, Court did not deny school board authority to remove 'vulgar, although not obscene' books from library).

The contrast between the *Tinker* and *Pico* decisions becomes evident when examining two aspects of the opinions. First, the burden of proof shifted between the cases from the school to the students. Both Courts emphasized that local school boards and school officials possess broad authority over the public schools⁶⁰ and balanced the school's interest in peace and order against the student's right to free expression.⁶¹ In *Tinker*, the Court gave the first amendment right of students special deference by placing the burden on the state to show that black armbands substantially disrupted the educational process.⁶² In contrast, the *Pico* Court gave undue deference to the state.⁶³ In *Pico*, the Court effectively placed the burden of persuasion on the students to show that school authorities had an unconstitutional motive when they removed the books from the library.⁶⁴

Tinker and *Pico* also applied different standards of review to the constitutional legitimacy of the school's suppression of student speech. The *Tinker* Court used a substantial disruption standard.⁶⁵ Under *Tinker*, school administrators can regulate expression on school property only if the speech causes a substantial disruption in the maintenance of discipline within the school.⁶⁶ The *Pico* Court apparently used a lower standard than "substantial disruption" in reviewing the school board's administrative actions. Under *Pico*, as long as the official decision is free of motives to suppress ideas or to promote political orthodoxy, school districts may regulate the contents of school libraries on any rational basis.⁶⁷ The conflicting standards found in *Pico* and *Tinker* obscure the appropriate standard for reviewing suppression of student speech in school.⁶⁸

60. *Pico*, 457 U.S. at 870; *Tinker*, 393 U.S. at 507.

61. See *supra* notes 37-40, 47, 50-51 and accompanying text.

62. 393 U.S. at 509.

63. 457 U.S. at 864-69. Quoting the school board's brief, the Court agreed "that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values, be they social, moral, or political.'" *Id.* at 864.

64. Rush, *supra* note 3, at 477 n.105. Even if the burden of proving an unconstitutional motive is overcome, the students' rights are still not absolute. Removal of present library books was distinguished from the acquisition of new library books. The decision in *Pico* did not affect "in any way the discretion of a local school board to choose books to add to the libraries of their schools." 457 U.S. at 871. In book removal situations, physical space limitation may justify the removal of various books. *Id.* at 875. Justice Blackmun, concurring in part in the decision in *Pico*, recognized three circumstances where removal should be allowed: 1) when a copy of the book is worn out, 2) when the book is obsolete, or 3) when the shelf space is limited. *Id.* at 879-80 (Blackmun, J., concurring). Justice Blackmun also noted that if a book is "psychologically or intellectually inappropriate for the age group, school authorities should be allowed to remove it." *Id.* at 877.

65. See *supra* note 38.

66. See *supra* note 38 and accompanying text.

67. See *supra* note 48 and accompanying text.

68. Rush, *supra* note 3, at 485-86.

II. THE FACTS OF *FRASER*

Matthew N. Fraser was a seventeen-year-old high school senior at Bethel High School, the only secondary school in the Bethel School District in Tacoma, Washington.⁶⁹ On April 26, 1983, Fraser gave a campaign speech at a student assembly on behalf of a candidate for student body vice-president. The assembly took place during school hours, but attendance was voluntary. Students not wishing to participate in the assembly could attend a study period in the library. About six hundred students attended the program.⁷⁰ Fraser's speech was laced with sexual innuendo:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel, is firm.

Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

Jeff is a man who will go to the very end—even the climax, for each and every one of you.

So vote for Jeff for ASB vice president—he'll never come between you and the best our high school can be.⁷¹

The students reacted boisterously to the speech. Some students "hooted and yelled," one student simulated masturbation, and two students simulated sexual intercourse by moving their hips.⁷² One teacher testified that the day after Fraser's speech, students expressed so much interest that she devoted approximately ten minutes of class time to discuss his speech.⁷³

The day after the speech, the assistant principal of Bethel High School charged Fraser with violating the school's disruptive conduct rule.⁷⁴ After a hearing, the school suspended Fraser for three days and removed his name from an approved list of candidates for graduation speaker.⁷⁵ After exhausting local administrative remedies, Fraser and his father filed a civil rights action against the school district in the United States District Court for the Western District of Washington. The district court issued a declaratory

69. 755 F.2d 1356, 1357 (9th Cir. 1985).

70. *Id.* at 1360.

71. *Id.* at 1357.

72. *Id.* at 1359.

73. *Id.* at 1360.

74. The rule appears in the student handbook. It states:

In addition to the criminal acts defined above, the commission of, or participation in certain non-criminal activities or acts may lead to disciplinary action. Generally, these are acts which disrupt and interfere with the educational process

. . . .

Disruptive conduct. Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

Id. at 1357 n.1.

75. *Id.*

judgment, finding that the school district had violated Fraser's rights under the Civil Rights Act and the first and fourteenth amendments of the Constitution.⁷⁶ The district court also ordered the school district to allow Fraser to participate in Bethel High School's commencement exercises as a graduation speaker. Finally, the court awarded Fraser damages, costs, and attorneys' fees.⁷⁷ The school district appealed the district court's decision.

III. THE NINTH CIRCUIT'S RATIONALE

The Court of Appeals for the Ninth Circuit affirmed the judgment of the district court on constitutional grounds alone. Because the school district did not assert that Fraser's speech was obscene, the court concluded that the school could justify disciplining Fraser only if his speech caused substantial disruption of the school routine or if the speech invaded the rights of others. The court applied the *Tinker* standard and held that the school district failed to prove that Fraser's speech was a substantial disruption. The court found that Fraser's speech evoked a lively and noisy response from the students.⁷⁸ This response was perceived as ordinary for a high school assembly.⁷⁹

The court also addressed the captive audience concerns raised by *Pacifica* and considered whether the audience of Fraser's speech was similar to the minor audience of the broadcast in *Pacifica*. First, the court concluded that there was no legitimate interest in privacy in a school assembly hall.⁸⁰ Second, the court reasoned that high school students are not impressionable young people who need protection from crude speech as did the potential listeners in *Pacifica*.⁸¹ Third, the court found that the assembly audience was not captive, because students were free to leave the assembly and attend a study hall.⁸² Fourth, the court stated that Fraser's speech was outside the school's legitimate authority to regulate the curriculum. Although the court acknowledged that school officials have broad discretion to control educational curricula, the court found that Fraser's speech was not part of Bethel High

76. *Id.* at 1358.

77. *Id.*

78. *Id.* at 1362. Because students have a first amendment right of expression in school, the court rejected two arguments made by the school district in support of its disciplinary action. The court first rejected the claim that the district could discipline Fraser because the nominating speech had a disruptive effect on the educational process of the school. *Id.* at 1360. Second, the court found that the school district's interest in maintaining a level of civility at the school did not outweigh Fraser's freedom of expression. *Id.*

79. *Id.* at 1362.

80. *Id.* at 1364.

81. *Id.*

82. *Id.*

School's curriculum at all.⁸³ The speech was nothing more than speech between students, which a school may not regulate in the name of curriculum.

The dissenting judge argued that the majority undervalued the authority of school officials to enforce standards of decency in public schools.⁸⁴ The dissent relied on the *Pico* Court's admonition that federal courts should not intervene in school affairs unless the school disregards basic constitutional rights of students.⁸⁵ The dissent discerned no constitutional violations in Fraser's case.⁸⁶ Finally, the dissent claimed that the majority misapplied the *Tinker* "substantial disruption" standard. According to the dissent, the *Tinker* standard allows a school district to regulate expression that would ordinarily be expected to disrupt students.⁸⁷ The dissent also concluded that Fraser's speech was in fact disruptive and harmful. The dissenting judge explained that the speech could be shocking, embarrassing, or detrimental to the students.⁸⁸

IV. THE SUPREME COURT'S RATIONALE

The Supreme Court reversed the Ninth Circuit Court of Appeals in *Bethel School District No. 403 v. Fraser*.⁸⁹ The Court held that Fraser's free speech and due process rights were not violated. It concluded that the school district did not unconstitutionally exceed the bounds of its disciplinary authority by suspending Fraser "in response to his offensively lewd and indecent speech."⁹⁰ The Court found it to be truly the work of the school board to determine what manner of speech in the classroom is inappropriate.⁹¹ Furthermore, Fraser's due process rights were not violated because two days' suspension "does not rise to the level of a penal sanction calling for the full panoply

83. The court stated, "The assembly, which was run by a student, was a voluntary activity in which students were invited to give their own speeches, not speeches prescribed by school authorities as part of the educational program." *Id.*

The speech did not take place during class. Accordingly, the Bethel School District's reliance on *Pico* was misplaced. As Justice Brennan said in the *Pico* decision, school boards may not "extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." 457 U.S. at 869. Moreover, a student-run election assembly is even further removed from the "compulsory environment of the classroom" than a library. 755 F.2d at 1364 (citing *Pico*, 457 U.S. 853 (1982)).

84. 755 F.2d at 1368 (Wright, J., dissenting).

85. *Id.* at 1366 (Wright, J., dissenting).

86. *Id.* at 1367 (Wright, J., dissenting). The dissent focused on the physical confinement of schools, the immaturity of the audience that heard the speech, and the school's interest in promoting citizenship, discipline and morality.

87. *Id.* at 1364 (Wright, J., dissenting).

88. *Id.* at 1365 (Wright, J., dissenting).

89. 106 S. Ct. 3159 (1986).

90. *Id.* at 3166.

91. *Id.* at 3165.

of procedural due process protections.''⁹² The Court found that Fraser had adequate warning that his speech could subject him to sanctions.⁹³

V. ANALYSIS OF THE *FRASER* DECISIONS

The court of appeals decided, as did *Tinker*, that school officials could not regulate a student's speech to other students without proof that the expression substantially disrupted or materially interfered with the educational process.⁹⁴ The speech was not obscene by either adult standards⁹⁵ or the *Ginsberg* variable standard.⁹⁶ High school students are approaching the age of majority, and the need to protect them against offensive speech is less compelling than is the need to protect young children against sexually related magazines.⁹⁷ Fraser's speech was innocuous compared to the content of the *Penthouse* magazines suppressed by *Ginsberg*. Thus, the *Ginsberg* standard could not be extended to warrant suppression of a speech like Fraser's.⁹⁸

92. *Id.* at 3166.

93. *Id.*

94. 755 F.2d at 1361. The *Tinker* decision recognized that students are entitled to express their views freely, absent a specific showing of constitutionally valid reasons to regulate student speech. 393 U.S. at 511.

95. *See supra* note 9.

96. *See supra* notes 10 & 13 and accompanying text.

97. The age and maturity of students in the audience must be considered to determine the breadth of students' first amendment rights. *See Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring).

98. On the other hand, the *Ginsberg* Court found that the state can regulate the sale of sexually explicit material to children in order to protect the interests of parents, many of whom do not want their children to see such material. *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968). Apparently, high school authorities can regulate access to sexually explicit material in their *in loco parentis* capacity. If the school wanted to suppress Fraser's speech on this basis, the content of Fraser's speech would have to be comparable to the magazines deemed obscene for children in *Ginsberg*. The statute involved in *Ginsberg* prohibited the sale of erotic materials to those under seventeen years of age. On a factual basis, Fraser's speech was not erotic in the same sense that the magazines were in *Ginsberg*; it was certainly not explicit. The speech probably would be protected under *Ginsberg*.

Furthermore, the statute in *Ginsberg* withstood the constitutional challenge because the government invoked other public policy interests. The statute banned the sale of erotic materials to children; the state's interest was to condemn the sale for profit of such material to children. *See New York v. Ferber*, 458 U.S. 747, 750-69 (1982) (state has strong interest in preventing sexual exploitation of children for profit). In *Fraser*, however, the speech had no underlying profit motive. Therefore, although the *Fraser* Court did not address whether the speech was obscene based on the standards set forth in *Roth*, *Miller* and *Ginsberg*, the speech was not obscene.

The Supreme Court in *Fraser* addresses the *in loco parentis* concept. 106 S. Ct. at 3165. However, the Court fails to distinguish between harm caused by explicit sexual materials sold to minors and an inappropriate speech at a high school assembly. The Court also failed to address the limitations of *in loco parentis* announced in earlier decisions. *See infra* note 114.

The Supreme Court's decision in *Fraser* is puzzling because it characterizes the sexual connotations in the speech as "lewd and obscene" without defining the meaning of those words.⁹⁹ Based on prior decisions of the Court in the area of students' first amendment rights, this use of "lewd and obscene" must be clarified in order to avoid confusion in the law. The Court avoided the issue of whether the speech was obscene under *Ginsberg's* variable obscenity standard or whether a new obscenity standard is applicable to school situations. Procedurally, the difference as to the characterization of obscenity is critical. Under the variable obscenity standard, if the student can show that the speech is not harmful, then the speech is not subject to regulation. By using the conclusory "lewd and obscene" language, the Court created a new standard for regulating students' first amendment rights. Under this new standard, school officials can regulate speech regardless of its harmful effect.

The Supreme Court also concluded that the possible embarrassment caused by Fraser's speech could be seriously damaging to a high school audience.¹⁰⁰ Such a conclusion is erroneous for two reasons. First, the evidence did not prove that there was any serious harm as a result of Fraser's speech. Second, there was no evidence that Fraser's speech had the potential for substantial harm. Unlike the immature audience in *Ginsberg*, Fraser's audience was more mature and, therefore, less in need of protection.¹⁰¹

Since Fraser's speech did not come within the variable obscenity test set forth in *Ginsberg*, the court of appeals correctly reached the question of whether the speech disrupted the school's routine.¹⁰² As established in *Tinker*, students have a fundamental right to freedom of expression.¹⁰³ Because freedom of expression is a fundamental right, even in school, the *Fraser* court properly placed a high burden on the state to justify suppressing the speech.¹⁰⁴

The state failed to prove that Fraser's speech was substantially disruptive. The court of appeals did not acknowledge such intangible disruptions as the embarrassment that some students might have felt after hearing the speech.

99. 106 S. Ct. at 3163.

100. *Id.* at 3165.

101. The Supreme Court stated that Fraser's speech could be seriously damaging to a less mature audience. *Id.* However, given today's fast-paced society, it is doubtful that fourteen-year-old high school students are unaware of human sexuality.

102. See Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746. Professor Tushnet states that the first amendment rights of children need the most protection in school, because of the length of time children spend there. *Id.* at 747.

103. *Tinker* states that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. See *supra* note 58 and accompanying text. If anything, Fraser's speech deserves greater first amendment protection than the conduct in *Tinker*, because it is pure speech and not speech mixed with conduct. With pure speech, punishment for past speech is not justified where substantial disruption did not occur. Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1973).

104. See Tushnet, *supra* note 102, at 750.

Nevertheless, the court followed *Tinker* and limited its review to physical disruption.¹⁰⁵ The school sought to punish Fraser for a speech that he had already given. To justify the punishment, the school district had to prove that Fraser's speech in fact substantially disrupted the school's routine. Nonetheless, the testimony showed that the students' reaction to Fraser's speech was modest. The hooting, yelling and sexually suggestive movements of the students could be expected by school authorities at a political assembly that was run for students by other students. Additionally, the ten-minute discussion of Fraser's speech in class the next day could be viewed as a healthy exchange of ideas, not a substantial disruption.

The analysis applied by the appellate court was rejected by the Supreme Court. The Supreme Court never addressed the lack of physical disruption caused by Fraser's speech and, in fact, only discussed potential non-physical harm that the speech might create.¹⁰⁶ The Supreme Court discussed the bewilderment and mimicry of other students as a result of the speech, but failed to equate these with the substantial disruption standard of *Tinker*.

An argument made by the school district in *Fraser* was that the students at the assembly were a captive audience.¹⁰⁷ For this argument, the school district heavily relied on *Pacifica*.¹⁰⁸ The court of appeals concluded that *Pacifica's* captive audience doctrine did not apply at the assembly. *Pacifica* was narrowly restricted to indecent expression broadcast into the privacy of a home.¹⁰⁹ A high school assembly is not a private place.¹¹⁰ The students at the assembly did not have the same expectation of privacy that the listeners in *Pacifica* did.

In addition, unlike the young, impressionable children in the audience for the *Pacifica* broadcast, Fraser's speech was made to high school seniors, individuals on the threshold of adulthood.¹¹¹ Fraser's classmates needed far

105. See *supra* notes 40-43 and accompanying text.

106. 106 S. Ct. at 3165. The Court stated that Fraser's speech "could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.*

107. 755 F.2d at 1361-62.

108. *Id.* at 1361-63.

109. 438 U.S. at 750. The *Pacifica* Court identified these factors that should weigh in the FCC's decision to sanction indecent broadcasts: 1) the time of the broadcast; 2) the type of broadcast (public or closed circuit); and 3) the context of the indecent speech. *Pacifica* distinguished sharply between regulation of ideas and regulation of expressive language. *Id.* at 746 n.22. Again, the Court is addressing the unique nature of broadcasting.

110. 755 F.2d at 1362.

111. The Supreme Court uses the maturity of minors as one measure by which to weigh minor's rights. One potent example is abortion: a minor can get an abortion without parental consent if she can persuade a court that she is mature enough to make an informed decision. *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). A maturity standard, even if objective, would be impracticable or impossible to administer. Because the age of Fraser's audience ranged from teenagers to adults, only offensive speech bordering on the obscene could be suppressed constitutionally.

less protection from sexual innuendo than did the young children in *Pacifica*. The high school students were free to stay at the assembly or to go to a study hall.¹¹² No person offended by Fraser's speech had to remain at the assembly.

The school district also relied on *Pico* to argue that school officials may control the school's curriculum, and by extension, the content of school-sponsored assemblies.¹¹³ This construction of the school's authority to shape a curriculum is too broad. A curriculum is a pedagogical agenda; schools and school districts may lecture to students, choose books, assign lessons, and grade students according to any rational plan of education.¹¹⁴ The *Pico* Court decided that a school curriculum is generally not subject to first amendment review.¹¹⁵ The *Pico* Court also recognized that many speech activities in the school could not be constitutionally restricted unless the speech is "indecent, vulgar, or educationally unsuitable."¹¹⁶ For example,

112. 755 F.2d at 1364.

113. *Id.* at 1361. As part of the district's argument that the assembly was a school-run event, the district stated that the student government was a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district" *Id.* at 1363 n.11 (citing WASH. REV. CODE § 28A.58.115 (1982)).

114. J. SAYLOR & W. ALEXANDER, CURRICULUM PLANNING FOR MODERN SCHOOLS 126-27 (1966). Several of the functions of public schools relate to the intellectual and emotional growth of the child. Schools help assess the "determination of individual talents, capabilities, and abilities; . . . development of individual potentialities; . . . transmission of the cultural heritage; discovery and systemization of knowledge; and development of character." *Id.* Another function of a public school is to inculcate values that provide "educational experiences that give pupils an understanding of the values, mores, and traditions of society, and that will ensure adherence to these values in behavior." *Id.* at 127. See *Ambach v. Norwick*, 441 U.S. 68, 76 (1976) (public schools vitally important as vehicles for inculcating fundamental values necessary to maintenance of democratic system). Schools also prepare children for adulthood. See Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497-500 (1981) (primary function of public education is to indoctrinate students with values of society); see also Orleans, *What Johnny Can't Read: "First Amendment Rights" in the Classroom*, 10 J.L. & EDUC. 1, 5-9 (1981) (students' first amendment rights conflict with effective curriculum administration); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What they Teach*, 124 U. PA. L. REV. 1293, 1343, 1350-54 (1976) (school's interest in inculcating ideas conflicts with "marketplace of ideas" conception of first amendment).

Some argument is made that schools have *in loco parentis* authority to control speech. *In loco parentis* status legally delegates to a non-parent a parent's control over a child. *In loco parentis* was recently rejected by the Supreme Court as a basis for limiting the rights of high schools students under the fourth amendment. *New Jersey v. T.L.O.*, 105 S. Ct. 733, 740-41 (1985). Cf. *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975) (because parental rights involved are not fundamental, state may corporally punish child).

115. See *supra* notes 51-52 and accompanying text.

116. See *supra* note 50 and accompanying text. See also Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 45 n.284 (1984):

[T]here is little doubt that a right of access conflicts with the inculcative function.

Justice Brennan noted in *Pico* that "the special characteristics of the school library make that environment especially appropriate for the recognition of the first amendment rights of students."¹¹⁷ The major concern reflected in *Pico* was that school board authorities might indoctrinate students in matters of politics, religion and related areas.¹¹⁸

The school assembly setting in *Fraser* can legitimately be compared to the library in *Pico*. The students at the assembly were invited to give their own speeches, not speeches prescribed by school authorities. This situation is analogous to entering a school library to seek out knowledge. Moreover, attendance at the assembly in *Fraser*, like the use of a library in *Pico*, was not compulsory. Therefore, *Fraser* should have had greater freedom to express himself at the school assembly than he would have had within the classroom. Moreover, the political nature of the assembly and the freedom given to the speakers at that assembly were completely outside the normal curriculum.¹¹⁹

Unless courts are willing to review curriculum decisions systematically, school officials have virtually uncontrolled discretion to determine the general curriculum and to determine the content of individual courses. These decisions inevitably provide access to some ideas and beliefs while denying access to others. A decision to eliminate classical languages from the curriculum denies access to information. A decision not to add a course in Asian history restricts the free flow of information. These content-based decisions presumably represent an informed decision that some types of information are more valuable than others. Such decisions are commonplace, and the authority of school officials to make them is almost universally accepted. Some critics of the decision may disagree because of educational concerns, but rarely will they argue that a constitutional right has been violated.

Id. at 46-47.

117. 457 U.S. at 868. Justice Brennan noted that a school library should aid student inquiry into areas not covered by the prescribed curriculum. *Id.* at 869. He also distinguished the school library from areas where the inculcative function of school authorities exists, by stating that school authorities may claim:

absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values That duty is misplaced where . . . they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

Id.

118. *Id.* at 870-71. This concern was expressed in light of Justice Brennan's statement that "local school boards have a substantial legitimate role to play in the determination of school library content." *Id.* at 869. Justice Brennan stated that students should not be regarded as closed-circuit recipients of the limited range of views that the state chooses to communicate. *Id.* at 868 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). He also quoted Justice Jackson's admonishment that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." 457 U.S. at 870 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Justice Brennan also noted that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom" 457 U.S. at 870 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

119. *Fraser* testified that he knowingly used sexual innuendo in his speech. 755 F.2d at 1363.

The Supreme Court's opinion appears to have misinterpreted the facts of *Fraser*. The Court found that the political assembly was part of a school-sponsored educational program in self-government.¹²⁰ Implying that the assembly was within the educative function of the Bethel School District, the Court found that the school's decision was not related to a political viewpoint.¹²¹ Fraser's speech was given in a political arena, in order to help elect his candidate. This is a setting outside the normal classroom environment. Although the speech was not expounding a political viewpoint, it was given in a political context. Whether *Tinker* has now been overruled, by interpretation if not declaration, is for future courts to determine. The Supreme Court's holding in *Fraser* does not properly address the findings of the lower court and, as a result, has left unclear whether students have first amendment rights while at school. It is difficult to determine exactly what the Supreme Court is trying to protect against in this case.¹²²

VI. PROPOSED MODEL FOR EXAMINING STUDENTS' RIGHTS

To remedy the confusion generated by the Supreme Court's decision in *Fraser*, this Note proposes a model for examining students' first amendment rights. By systematically applying the standards set out by the Supreme Court in its previous decisions, the proposed model provides school officials with a four-step methodology for determining what speech may be constitutionally regulated within the public schools.

The first step is to decide whether the speech is obscene by adult standards. If the expression "appeals to the prurient interests" or "describes, in a patently offensive way, sexual conduct," and "lacks serious literary, artistic,

Once Fraser's speech took place in the political arena, suppression of that speech would unconstitutionally deny Fraser his right to convey his political ideas in getting his candidate elected. Based on Fraser's testimony, he gave his speech because of its intended political impact. A political statement often contains provocative statements to gain the attention of an audience.

120. 106 S. Ct. at 3162. The Court concludes that there is a marked distinction between the political symbol in *Tinker* and the sexual innuendo used by Fraser. *Id.* at 3163. As support for this conclusion, the Court noted that the use of the armband in *Tinker* did not intrude on the rights of the school or other students. *Id.* However, there was no evidence in *Fraser* indicating that Fraser's speech caused substantial disruption of the educational process. As Justice Marshall stated in his dissenting opinion, "The school district failed to demonstrate that respondent's remarks were indeed disruptive." *Id.* at 3168 (Marshall, J., dissenting).

121. *Id.*

122. In his concurring opinion, Justice Brennan once again recognized that students do not give up their constitutional rights when they go to school. *Id.* at 3167. Fraser's speech could only be suppressed if it were harmful to other students or if it disrupted the school's processes. *Id.*

Justice Brennan held that Fraser's speech was not harmful to other students, *id.* at 3168 n.2., but it did disrupt the educational mission. *Id.* at 3168. In reaching his decision, Justice Brennan recognized a school's interest in teaching proper civil discourse. *Id.* However, such analysis fails to give weight to a school's interest in teaching the precepts of the first amendment.

or scientific value," the speech is obscene.¹²³ Obscene speech may be regulated for adults and children.

If the speech is not obscene by adult standards, the second step is to determine the age of the audience. This is derived from the *Ginsberg* variable obscenity standard. The age and maturity of possible onlookers are taken into account to measure the potential harm caused by the speech.¹²⁴ If there might be young children in the audience, the state may presume that indecent or vulgar speech will be harmful to that part of the audience. The variable obscenity standard restricts more speech if the audience contains young children, but allows greater liberty in a speech addressed at children close to majority. A speech directed at young children may be classified as vulgar or obscene within the variable obscenity standard, while the same speech directed at older students may escape such classification.

Third, if the speech is classified as not obscene under the variable obscenity standard, then the school may limit the time, place, and manner of the speech. Because public school classrooms serve an important inculcative function, school administrators may bar provocative speech.¹²⁵ By contrast, if the speech occurs outside the classroom, the school has less authority to regulate it.¹²⁶

Fourth, the rights and interests of the parties must be balanced. The speaker has a fundamental right to express non-obscene ideas, and the listener has the right to receive information.¹²⁷ Meanwhile, the school may legitimately regulate speech that would substantially disrupt the school's peace and order.¹²⁸ Once it is decided that the student speech is not obscene under any standard, the court must scrutinize the state's claim of administrative convenience to assess the student's right to speech.

Even in school, first amendment rights may only be limited if the state can show a compelling need to limit the speech.¹²⁹ The state must also show that the restriction is narrowly tailored to the asserted need.¹³⁰ Among other things, the regulation must be sensitive to where the speech takes place. If the speech occurs within the classroom, the state must show that the speech substantially disrupted the educational and inculcative function of the school. If the speech occurs outside the classroom, the state must show that the

123. See *supra* note 10.

124. See *supra* note 9.

125. See *supra* notes 57-58 and accompanying text.

126. As the *Pico* Court explained, extra-curricular activity is important for the self-enrichment of the students. In this area of the school, indoctrination into society is not the most important interest. See *supra* notes 52-53 and accompanying text.

127. See *supra* notes 55-56 and accompanying text.

128. See *supra* note 114.

129. See *supra* note 28.

130. *Id.*

expression may substantially disrupt peace and order in the school.¹³¹

A. Application of the Model to the Fraser Decision

The model organizes the factual issues to be resolved when analyzing a first amendment claim by a student in a public school. Application of the model to the facts of *Fraser* illustrates the usefulness of this model. Under the first step, which is to determine whether the speech is obscene, Fraser spoke to an audience composed of students his age and adult school officials. Based on the maturity of the audience, it is unlikely that the listeners were harmed by Fraser's speech. This is highlighted by the fact that there was no factual assertion that Fraser's speech was obscene. Although the Supreme Court characterized Fraser's speech as "lewd and obscene,"¹³² the speech was not patently offensive and was relatively innocuous compared to the material in *Ginsberg*.¹³³

Second, the speech must be scrutinized to determine whether it falls into the variable obscenity standard. The audience in *Fraser* consisted exclusively of high school students and officials. In addition, the speech was contained within the school's assembly hall and could not be heard by young children. Thus, the age and maturity of the audience in *Fraser* was sufficient to treat the speech under the adult obscenity standards. In fact, the court of appeals recognized that high school students are not impressionable young people who need protection from crude speech.¹³⁴

Third, the school may exert some authority to regulate the time, place and manner of the speech. Arguably, a student assembly run by students for other students is far enough removed from the classroom that school officials have no inculcative interests. Furthermore, given that the assembly was ostensibly political in nature, school officials have even less authority to regulate such expression.

Finally, the rights and interests of the parties must be balanced. In balancing the interests of the parties, the state has an interest in socializing students and developing decent citizens. On the other hand, Fraser has an interest in delivering his speech. Furthermore, the student listeners have an interest in exercising their free choice of whether or not to hear the speech. Since the audience was free to leave the assembly,¹³⁵ their interests were not

131. The *Pico* Court found that the school's motive for regulating the speech should be investigated. If the motive is an unconstitutional desire to suppress ideas, then the speech cannot be prohibited. See *supra* notes 49-51 and accompanying text. However, the proposed model suggests that a motivational inquiry be employed as a last resort. As one scholar explained, the burden of proving an unconstitutional motive is "formidable." Rush, *supra* note 3, at 477 n.105.

132. 106 S. Ct. at 3163.

133. See *supra* note 98 and accompanying text.

134. 755 F.2d at 1363.

135. 106 S. Ct. at 3162.

violated by Fraser's speech. Given that Fraser's speech took place outside of the classroom, the burden is on the state to show how the listeners would be harmed. Considering the age and maturity of the audience, no harm could have been anticipated as a result of Fraser's speech. Therefore, Fraser's speech would have had to cause substantial disruption to the educational process before the state could regulate it. The record shows no such substantial disruption.¹³⁶ Thus, under the proposed model, Fraser's speech is protected under the first amendment.

CONCLUSION

The *Fraser* decision is significant because it could have reaffirmed the freedom of expression standards developed in *Ginsberg*, *Tinker*, and *Pico*. Given the recent diminution in constitutional rights of students as individuals, *Fraser* could have reasserted the value of student's first amendment rights in school. The proposed model analysis for constitutionally regulating speech in public schools, inspired by the *Fraser* case, acknowledges the state's interest in carrying out its educational mission without substantial disruption. School officials can maintain peace and order in the school in a manner consistent with the Constitution. The model also protects the state's interest in the well-being of the students. However, as the model bears out, the Constitution does not grant school officials unlimited license to suppress student speech. If student speech remains within the bounds of decency and does not substantially disrupt the school routine, then the school may not interfere with the speech.

The Supreme Court's decision in *Fraser* is confusing and alarming. The implications of the Court's holding are twofold. First, the type of activities within the school in which school officials have a vested interest in controlling has widened. Second, by using unproven sensibilities of students to justify suppressing supposedly obscene speech, the Court has further clouded the determination of when student speech is properly regulated. Fraser may not have left his first amendment rights at the schoolhouse door, but what those rights are within the school environment has been substantially limited.

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136. *Id.* at 3168 (Marshall, J., dissenting).